83-347

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

A.L. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION — PETITIONER

VS.

JIMMY LEE DYAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ATTORNEYS FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

WHETHER IN A HABEAS CORPUS CASE INVOLVING A STATE PRISONER A HEARING IS NECESSARY IN THE ABSENCE OF FACTS ESTABLISHING A CONSTITUTIONAL VIOLATION AND IN THE ABSENCE OF ANY ALLEGATION OF ACTUAL BIAS?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

This case involves a state court conviction which was affirmed on direct appeal by the Arkansas Supreme Court. Dyas v. State, 260 Ark. 303, 539 S.W.2d 251 (1976). A petition for a writ of habeas corpus was dismissed by the United States District Court for the Eastern District of Arkansas on July 21, 1982. A copy of this opinion appears in the appendix. On appeal to the United States Court of Appeals for the Eighth Circuit, Dyas v. Lockhart, No. 82-2016, the case was remanded. A copy of this opinion appears in the appendix and is the subject of this petition.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1). Petitioner seeks review of an opinion rendered by the United States Court of

Appeals for the Eighth Circuit on April 21, 1983 in Dyas v. Lockhart, No. 82-2016 which remanded the case to the United States District Court for the Eastern District of Arkansas. A petition for rehearing en banc was denied on June 14, 1983. (Three judges would have granted.) Pursuant to Rule 17 of the Rules of the Supreme Court, petitioner submits that the opinion to be reviewed is in conflict with this Court's holdings in Townsend v. Sain, 372 U.S. 293 (1963) and Smith v. Phillips, 455 U.S. 209 (1982) governing federal court review of state court judgments under 28 U.S.C. §2254 and is a departure from the accepted and usual course of judicial proceedings.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amend-

ment Fourteen

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C §2254(a)

> §2254. State custody; remedies in Federal courts
>
> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Respondent was convicted in the Circuit Court of Little River County, Arkansas, of capital murder and sentenced to life imprisonment without parole. On appeal, the Arkansas Supreme Court affirmed. Dyas v. State, 260 Ark.

303, 539 S.W.2d 251 (1976). The issue of the kinship relationship of the trial judge and the prosecuting attorney was specifically held to be waived for lack of an objection. 260 Ark. at 323.

Following the exhaustion of state post-conviction remedies, respondent filed a petition seeking habeas corpus relief in the United States District Court, Eastern Division. The case was assigned to Judge Elsijane T. Roy, who referred it to United States Magistrate Henry L. Jones, Jr. At no time was Judge Roy's qualification to hear this case challenged in the district court.

Petitioner moved to dismiss the petition pursuant to Wainwright v. Sykes, 433 U.S. 72 (1977). Judge Roy dismissed the petition upon the magistrate's recommendation on the grounds that the sole issue dealt with state law and there was no due process violation

established by the respondent's allegations.

On appeal of that dismissal to the Eighth Circuit, respondent raised two issues: (1) that a due process violation should be imputed from a violation of the Arkansas Code of Judicial Conduct and (2) that Judge Roy was disqualified from acting on his petition because of her former position on the Arkansas Supreme Court at the time of the affirmance of his direct appeal.

On January 12, 1983, oral argument on these two issues was presented before The Honorable Judges Heaney, Gibson and McMillian. An opinion was entered on April 21, 1983, with which the petitioner takes respectful exception. A petition for rehearing en banc was denied on June 14, 1983. (Judges Ross, Arnold and Fagg would have granted.)

REASONS FOR GRANTING THE WRIT

I.

AS THE RELEVANT FACTS OF THIS CASE FAIL TO ESTABLISH A CONSTITUTIONAL VIOLATION AND THERE HAS BEEN NO ALLEGATION OF ACTUAL BIAS IN THE STATE TRIAL COURT'S CONDUCT OF RESPONDENT'S TRIAL FOR CAPITAL MURDER, A HEARING TO ESTABLISH WAIVER IS UNNECESSARY AND A HEARING TO ESTABLISH ACTUAL BIAS IS WITHOUT JURISDICTION.

The issue in this habeas corpus case involving a State prisoner is whether the United States Court of Appeals for the Eighth Circuit erred in remanding this case for a hearing when it agreed that no constitutional violation had been established by the relevant and uncontroverted facts of the case. Petitioner submits that the threshold considerations of Townsend v. Sain, 372 U.S. 293 (1963) governing the necessity of conducting a hearing and the requirement of actual bias enunciated in Smith v. Phillips, 455 U.S. 209 (1982) support the district

court's dismissal of the petition and preclude the result reached by the Eighth Circuit.

Following consideration of the habeas corpus petitioner's sole issue, which raised a question of law, not fact, the district court ordered the petition to be dismissed without an evidentiary hearing being held. On appeal to the Eighth Circuit, the habeas corpus petitioner-appellant alleged error in the district court's opinion as a matter of law, but did not allege error in any factual determination or in the district court's failure to conduct a hearing. As a matter of law the Eighth Circuit Court of Appeals agreed with the district court, yet the Court remanded the case for a hearing on facts which petitioner here contends are totally irrelevant to the issues raised in either respondent's original habeas corpus peti-

tion or in his appeal. Petitioner respectfully submits that such action is precluded by 28 U.S.C. §2254; Townsend v. Sain, supra; and Smith v. Phillips, supra.

The relevant and uncontroverted facts of this case are that the State trial court judge who presided at the respondent's capital murder trial was the uncle of the prosecuting attorney; that based on this relationship the judge offered to recuse; and that respondent's trial counsel declined such offer. The factual question unresolved by the record and unnecessary to a decision is whether the respondent personally waived the judge's offer to disqualify. Whereas the unresolved factual question in this case might be relevant to certain issues (such as the lack of a contemporary objection); it is not relevant to the federal constitutional

issues raised by the respondent.

The respondent's personal waiver of the disqualification offer was considered by the Eighth Circuit Court of Appeals to be a "threshold" requirement. The threshold requirement for consideration of a petition for a writ of habeas corpus is stated in 28 U.S.C. §2254(a):

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws of treaties of the United States. (Emphasis added.)

The only ground which respondent has ever raised for relief in his petition and on appeal is that the relationship of the judge and the prosecuting attorney violated the state Code of Judicial Conduct and that the appear-

ance of impropriety of this relationship constituted a due process violation under the United States Constitution. The Eighth Circuit in its opinion recognized that "Dyas' sole basis for imputing bias here is" a violation of the state Code of Judicial Conduct. Slip opinion at 5. (Emphasis added) The district court also recognized that: "Petitioner bases his argument on the contention that the judge's failure to recuse violated state law and judicial canons of ethics."

The district court went on in its order and stated that the basis of petitioner's argument was a matter of State law, not reviewable in that court. The Eighth Circuit agreed on the non-applicability of state law and judicial canons. (Slip opinion at 4, footnote 1.) The concluding paragraph of the district court's order of dismissal states:

As for the due process

> argument under the Constitution of the United States, petitioner has not alleged in his petition nor his response to the motion to dismiss any specific prejudice or any evidence of unfairness in the trial. Nor dies the Court find that prejudice may automatically be presumed in this situation. In addition, it would be difficult to find for the petitioner in any event inasmuch as the judge offered to recuse and petitioner's counsel declined to accept the offer. (Emphasis added.)

Significantly, the Eighth Circuit also agreed with this assessment stating "We conclude that Judge Steele's relatiopship to the Prosecuting Attorneys was, standing alone, insufficient to raise the conclusive presumption of his actual bias." Slip opinion at 5. The relationship "standing alone" is insufficient to establish any constitutional violation.

There has never been an allegation of actual bias in the state court judge's conduct of the trial in this case. The

state court trial transcript is not a part of the record in this case because it was unnecessary for a determination of the only issue raised by the respondent. To remand for a hearing on actual bias in the conduct of the trial (slip opinion at 7), appears to petitioner to be an expansion of the respondent's grounds for relief, rather than an appropriate remedy. To expand a habeas petitioner's potential grounds for relief is to exceed the scope of the court's jurisdiction as defined in 28 U.S.C. §2254.

The state court addressed the issue of the appearance of impropriety based on the relationship of the judge and the prosecuting attorney: they held it to be waived by the contemporaneous objection rule. Petitioner moved to dismiss on the basis of Wainwright v. Sykes, 433 U.S. 72 (1977). The district court did

dismiss the petition, not on the basis of the contemporaneous objection rule, but on the basis that no deprivation of a constitutional right was established by the respondent's allegations. Thus, there was no necessity for a hearing or the establishment of a personal waiver by the respondent of the trial court's offer to recuse.

The Eighth Circuit acknowledged that the appearance of impropriety of the kinship of the judge and the prosecuting attorney does not establish a due process violation. A due process violation is the only grounds upon which either the district court or the appellate court could entertain jurisdiction. By affirming the district court's opinion on this question of law given an established set of facts, this case should have been complete and affirmed.

Petitioner takes specific issue with

the following statements made by the Eighth Circuit in its opinion:

> However, before determining whether Judge Steele's relationship with the Prosecuting Attorneys necessarily suggests unconstitutional bias, we need to address the threshold question of whether Dyas personally waived Judge Steele's disqualification offer.
>
> * * *
>
> [W]e conclude it is appropriate to remand this case to the federal district court for a hearing on the question of whether Dyas knew about and nevertheless declined to accept Judge Steele's recusal offer. Townsend v. Sain, 372 U.S. 293, 313 (1963). See also Blackwell v. Brewer, 562 F.2d 596, 600 (8th Cir. 1977).

Slip opinion at 3-4.

Without an allegation by Dyas of actual bias and with the district court's and Eighth Circuit court's findings that bias may not be presumed, no constitutional violation has been established. If there is no constitutional violation,

there is no necessity to establish waiver and no necessity for a hearing. Townsend v. Sain, 372 U.S. 293 (1963). It is appellee's position that the threshold question is whether there is an allegation that if shown to be true will establish a deprivation of a constitutional right. If there is such an allegation, then certainly waiver is a relevant issue. In this case, there was not such an allegation.

The Eighth Circuit relies upon Townsend v. Sain, supra, in its opinion. Petitioner submits that Townsend v. Sain supports its position that the threshold question is not whether there was a waiver, but, instead, whether there is an allegation of a deprivation of a constitutional right. The answer to the latter question in this case is no because the respondent has failed to allege facts which establish such a con-

stitutional deprivation.

Townsend v. Sain provides the appropriate standard for determining when an evidentiary hearing is appropriate in a federal district court. The requirement is that there must be an allegation of facts which if proved would entitle the petitioner to relief. There was no allegation of fact here to be proved. There was no factual dispute, just a legal determination of the significance of the relationship between the judge and the prosecutor. These agreed upon facts simply failed to establish a basis for relief.

The Court also relies upon Blackwell v. Brewer, 562 F.2d 596, 600 (8th Cir. 1977), a case which was remanded for a determination of the waiver of a constitutional error. In Blackwell, the threshold question of the existence of constitutional error was well settled.

In that case, the State and the district court had both found a violation of the petitioner's Sixth Amendment right of confrontation. Each had held the error harmless. The Eighth Circuit rejected the finding that the error was harmless and remanded the case for consideration of the issue of waiver which had not been previously considered. Appellee submits that Blackwell v. Brewer, also supports its position as the establishment of a waiver was only found to be necessary where a constitutional violation was clearly found to exist.

In Smith v. Phillips, 455 U.S. 209 (1982), a habeas petitioner alleged a due process violation to be established by the conduct of a juror. The district court found insufficient evidence of actual bias, but imputed bias from an appearance of impropriety. The United

States Court of Appeals for the Second Circuit affirmed on a separate ground that the prosecutor's actions relative to the juror violated the petitioner's due process rights. The United States Supreme Court reversed and held that due process does not require a new trial when a juror is placed in a potentially compromising situation. The petitioner's remedy in that case was a hearing to establish actual bias. Such a hearing had been previously conducted in the state court and its finding of insufficient evidence to establish juror bias was held to be presumptively correct citing Sumner v. Mata, 449 U.S. 539 (1981). Smith v. Phillips did not involve a remand to establish actual bias, no constitutional violation was found to exist.

This Court's opinion in Cuyler v. Sullivan, 446 U.S. 335 (1980) also supports petitioner's argument. The mere

possibility of a conflict of interest involving a defense attorney was insufficient, the habeas corpus petitioner in that case had to show actual conflict which adversely affected his counsel's performance. Cuyler v. Sullivan involved a mixed question of law and fact which was open to collateral attack. In the instant case, the facts were settled.

Petitioner has at all times acknowledged the relationship of the judge and the prosecuting attorney and that due process includes the right to an impartial trial judge. Respondent has never alleged that the trial judge was biased in his conduct of the trial; he has at all times based his allegation of bias on the appearance of impropriety. As the Eighth Circuit and the district court have found no constitutional violation based on the appearance of impropriety, there is no need to remand this

case to establish waiver.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on a writ of certiorari will only be granted when there are special and important reasons therefore. Subsection (c) provides that such writs will be granted when a federal court of appeals has decided a federal question in a way in conflict with applicable decisions of this Court. Petitioner submits that the Eighth Circuit's opinion is in direct conflict with Townsend v. Sain, supra, and Smith v. Phillips, supra, as no constitutional violation has ever been found on the grounds alleged.

Petitioner recognizes that review on a writ of certiorari is discretionary and submits that this case is worthy of consideration based on considerations of comity for state court judgments and

judicial economy in the holding of unnecessary further proceedings, in addition to the conflict with the above cited cases.

Therefore, for these reasons and for the authorities cited in this petition for a writ of certiorari, petitioner respectfully prays that this Court will vacate the opinion of the United States Court of Appeals for the Eighth Circuit remanding the case for a hearing and will reinstate the district court's dismissal of respondent's habeas corpus petition. Pursuant to Rule 23.1 of the Rules of the Supreme Court, petitioner respectfully suggests that this case may be summarily decided on its merits.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I, Leslie M. Powell, Assistant Attorney General, do hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit has been served on respondent herein by mailing a copy of same, postage prepaid, to Mr. Paul Petty, 602 West Arch St., Searcy, Arkansas, 72143, this 30 day of August, 1983.

Leslie M Powell
LESLIE M. POWELL
Assistant Attorney General

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 82-2016

JIMMIE LEE DYAS APPELLANT

VS.

ART LOCKHART, Commissioner
of Arkansas Department of
Correction APPELLEE

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF ARKANSAS

Submitted: January 12, 1983
Filed: April 21, 1983

Before HEANEY, Circuit Judge,
FLOYD R. GIBSON, Senior
Circuit Judge, and
McMILLIAN, Circuit Judge

FLOYD R. GIBSON
Senior Circuit Judge

In 1975, habeas petitioner Jimmie Lee Dyas was convicted of capital felony murder by a jury in the Little River (Arkansas) Circuit Court. Dyas was sentenced to life imprisonment without possibility of parole. The presiding judge at Dyas' trial was the now deceased

Judge Bobby Steele, who was the uncle of the Prosecuting Attorney and the brother and father of the two Deputy Prosecuting Attorneys who participated in the prosecution of Dyas. Before trial, Judge Steele sua sponte wrote Dyas' trial counsel and offered to disqualify himself because of his [Slip opinion page 1] relationships with the Prosecuting Attorneys. Dyas' counsel refused Judge Steele's offer to disqualify.

In his pro se direct appeal to the Arkansas Supreme Court, Dyas claimed inter alia Judge Steele was disqualified from trying the case given his relationship with the Prosecuting Attorneys. Dyas alleged that he was not personally aware of Judge Steele's disqualification offer because trial counsel had not communicated the offer of recusal to him. The Arkansas Supreme Court, addressing this allegation stated: "The actual record is deficient on this point and appellant's com-

plaint is too late and cannot be raised for the first time on appeal. We note that the identical surnames of the judge and the prosecuting attorney were obviously known." Dyas v. State, 260 Ark. 303, 323, 539 S.W.2d 251, 263 (1976).

In 1981, after Dyas had exhausted his Arkansas post-conviction remedies, he filed his habeas petition in the United States District Court, Eastern Division. Dyas alleged that Judge Steele's refusal to disqualify himself violated Arkansas constitutional and statutory law, the Code of Judicial Conduct adopted by the Arkansas Supreme Court, and the due process clause of the fifth and fourteenth amendments. The case was assigned to District Judge Elsijane T. Roy, who, in turn, assigned the case to U. S. Magistrate Henry Jones for a proposed recommendation for disposition of the case. Judge Roy had

served as an associate justice of the Arkansas Supreme Court when Dyas' conviction was affirmed by that Court on direct appeal.

Judge Roy, adopting Magistrate Jones' recommendation, dismissed Dyas' petition without a hearing, concluding that Dyas' disqualification claim stated no due process violation because there was no specific showing of prejudice or unfairness in the trial. Judge Roy also noted that Dyas' counsel had failed to accept Judge Steele's recusal offer. [Slip opinion page 2]

On appeal, Dyas contends he was denied his due process right to a fair trial by Judge Steele's presiding over his criminal trial. Dyas suggests that, absent a showing that he personally waived Judge Steele's disqualification offer, this court should conclusively presume actual bias and, hence, actual preju-

dice from Judge Steele's relationship to the Prosecuting Attorneys.

Certainly, a fair trial in a fair tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133, 136 (1955). And the right to a fair trial necessarily requires that the trial judge be neutral, detached, and free from actual bias. Id., Ward of Monroeville, 409 U.S. 57, 61-2 (1972). However, before determining whether Judge Steele's relationship with the Prosecuting Attorneys necessarily suggests unconstitutional bias, we need to address the threshold questions of whether Dyas personally waived Judge Steele's disqualification offer. If Dyas knew of Judge Steele's disqualification offer and nevertheless declined to accept it, he cannot now be heard to claim that he was denied due process by Judge Steele's presiding at his criminal trial. Johnson v. United States, 318 U.S. 189, 201 (1943).

Unfortunately, neither the Arkansas Supreme Court nor the district court addressed whether Dyas was given an opportunity to accept Judge Steele's recusal offer. The Arkansas Supreme Court simply found that Dyas could not raise the disqualification issue for the first time on appeal. The district court noted that Dyas' counsel was aware of Judge Steele's offer, but did not address whether Dyas was aware of that offer. During oral argument before this court, however, counsel for the State of Arkansas indicated that two of Dyas' four trial counsels had told Dyas about the disqualification offer.

Under the circumstances, we conclude it is appropriate to remand this case to the federal district court for a hearing on the question of whether Dyas knew about and nevertheless declined [Slip opinion page 3] to

accept Judge Steele's recusal offer. Townsend v. Sain, 372 U.S. 293, 313 (1963). See also, Blackwell v. Brewer, 562 F.2d 596, 600 (8th Cir. 1977) (remand to district court for hearing on whether petitioner waived objection to alleged constitutional error in conduct of trial, where neither state court nor district court had addessed waiver issue).[1]

Assuming that the district court determines after a hearing that Dyas did not personally waive Judge Steele's disqualification offer, Dyas contends the district court must grant his petition. Dyas suggests that, absent his personal waiver, he was denied due process because Judge Steele is conclusively presumed to be biased given his relationship to the Prosecuting Attorney; Dyas claims that he need not demonstrate Judge Steele's actual bias or actual prejudice.

Generally, a habeas petitioner seeking reversal of his conviction on due process grounds because of the trial judge's alleged bias must demonstrate that the judge was actually biased or prejudiced against the petitioner. See Corbett v. Bordenkircher, 615 F.2d 722, 723-24 (7th Cir. 1980); Brinlee v. Crisp, 608 F.2d 839, 852-53 (10th Cir. 1979); compare Smith v. Phillips, ____ U.S. ____, 71 L.Ed. 78, 85-87 (1982) (petitioner alleging juror bias must prove actual bias to establish due process claim). However, as the Supreme Court has [Slip opinion page 4] recognized, "[n]ot only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" Withrow v. Larkin, 421 U.S. 35, 47 (1975), quoting In re Murchison, 349 U.S. at 136. Accordingly, there are cases where "experience teaches that the probability of actual prejudice on the

part of the judge or decisionmaker is too high to be constitutionally tolerable." Id. For example, experience teaches that the probability of actual bias is too high where the judge has a pecuniary interest in the outcome of a trial[2] or where the judge has been the target of personal abuse or criticism from the party before him.[3] Id. The test in determining if a judge's bias should be presumed in a particular case is whether, realistically considering psychological tendencies and human weaknesses, the judge would be unable to hold the proper balance between the state and the accused. Tumey v. Ohio, 273 U.S. 510, 532; Withrow v. Larkin, 421 U.S. at 47; Taylor v. Hayes, 418 U.S. 488, 501 (1974). In making this inquiry we, of course, presume the honesty and integrity of those serving as judges. Withrow v. Larkin, 421 U.S. at 47.

We conclude that Judge Steele's relationship to the Prosecuting Attorneys was, standing alone, insufficient to taise the conclusive presumption of his actual bias. Judge Steele had no personal interest in the outcome of the case other than fairly trying and submitting the issues to the jury. Dyas' sole basis for inputing bias here is that canon 3C(1)(d)(ii) of the Code of Judicial Conduct[4] requires ddisqualification where a "person [Slip opinion page 5] within the third degree of relationship" to the judge is "acting as a lawyer in the proceeding." See United States v. Potashnick v. Port City Const. Co., 609 F.2d 1101, 1112-13 (5th Cir. 1980) (court interpreted 28 U.S.C. §455(b)(5)(ii) (1976), which is substantially identical to Canon 3C of the Code of Judicial Conduct, to require automatic disqualification where a person within third degree of relationship to judge is acting as an attorney). See also United States v. Conforte,

624 F.2d 869, 881 (9th Cir. 1980). However, a trial judge's disqualification under the Code of Judicial Conduct does not necessarily imply impermissible bias under the due process clause. See Note, Disqualification of Judges and Justices in the Federal Courts, 86 Harv. L. Rev. 736, 746 (1973). Furthermore, the case before us is distinguishable from those cases where an unconstitutionally high probability of actual bias was found to exist, such as where the judge had a pecuniary interest in the outcome of the trial or where he had been the target of the defendant's severe personal abuse. Here, the Prosecuting Attorneys were acting in the interest of the State of Arkansas, not in their own personal, financial interests. Furthermore, the relationship here does not necessarily suggest that Judge Steele had such a strong personal or financial interest in the outcome of the trial that he was unable to hold the proper balance

between the state and the accused. In re Murchison, 349 U.S. at 136. [Slip opinion page 6]

However, if on remand the district court determines that Dyas did not personally waive Judge Steele's disqualification offer, Dyas should be provided a hearing in which he has the opportunity to prove Judge Steele's actual bias. See Smith v. Phillips, ____ U.S. ____, 71 L.Ed. 78, 85-86 (1982) (remedy for defendant's claim of juror partiality is hearing in which defendant has opportunity to prove actual bias). The district court should consider Judge Steele's relationship with the Prosecuting Attorneys as one factor, although not the only factor, in determining whether Dyas was denied his constitutional right to a neutral and detached trial judge. The district court should also consider Judge Steele's overall conduct during the court of the trial

and whether he exhibited any specific prejudice or bias against Dyas.

Finally, while we do not believe District Judge Roy's failure to sua sponte recuse herself suggests any impropriety on her part,[5] we nevertheless conclude that a remand to another district judge in the Eastern District of Arkansas would be in accordance with the purpose behind 28 U.S.C. §455(a) (1976) of assuring the "appearance of impartiality." See United States v. Poludniak, 657 F.2d 948, 954 (8th Cir. 1981).

A true copy.

Attest:

CLERK,
U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[1]Dyas urges that under Canon 3C(1)(d)-(ii) and 3D of the Code of Judicial Conduct, which was adopted by the Arkansas Supreme Court in 1974, the only acceptable form of waiver is his signed written waiver. This written waiver requirement, however, has been held to be applicable only from date of May 22, 1978, which is subsequent to Dyas' trial. See Edmonson v. Farris, 263 Ark. 505, 510, 565 S.W.2d 617, 619 (1978); Adams v. State, 269 Ark. 548, 553, 601 S.W.2d 881, 883 (1980). Moreover, Dyas' claim here is brought under the due process clause of the fourteenth amendment, not under Arkansas rules for waiver of a judge's disqualification. Dyas has not suggested and we fail to see why the due process clause of the fourteenth amendment would require the personal written waiver requirement set forth in the Canons of the Code of Judicial Conduct.

[2]Ward v. Monroeville, 409 U.S. 57, 61-62 (1972); Tumey v. Ohio, 273 U.S. 510, 511 (1927).

[3]Taylor v. Hayes, 418 U.S. 488, 501-03 (1974); Mayberry v. Pennsylvania, 400 U.S. 455, 464-66 (1971).

[4]Canon 3C(1)(d)(ii) of the Code of Judicial Conduct which was adopted by the Arkansas Supreme Court in 1974 (See Adams v. State, 269 Ark. 548, 601 S.W.2d 881, 882 (1980)), provides in pertinent part:

> C. Disqualification
>
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be

questioned, including but not limited to instances where:

* * *

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of each person:

* * *

(ii) is acting as a lawyer in the proceedings.

[5]Dyas never raised the issue of Judge Roy's possible disqualification in the district court.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

JIMMIE LEE DYAS PETITIONER

VS. PB-C-81-387

ART LOCKHART, Commissioner of the Arkansas Department of Correction RESPONDENT

ORDER

Pending before the Court in this petition for a writ of habeas corpus is a motion to dismiss. Pursuant to 28 U.S.C. §636, United States Magistrate Henry L. Jones, Jr., has rendered his proposed recommendation as to the disposition of this case. Objections thereto have been filed by the defendant. The Court has considered same but has concluded that the findings of the Magistrate are correct.

The Court adopts the statement of facts as set forth in petitioner's Brief in Support of Petitioner's Response to Motion to Dismiss:

> That the Petitioner, Jimmie Lee Dyas, was tried and convicted in the Circuit Court of Little River County, Arkansas in 1975 of capital felony murder and was sentenced to life imprisonment without parole; that the presiding Judge at the Petitioner's trial was Judge Bobby Steel; that the following officers of the Court, all related to Judge Bobby Steel within the fourth degree of relationship, participated in the trial of Petitioner in their respective official capacities, to-wit: Daisy B. Steel, the wife of the presiding Judge, was the official Court Reporter; George Steel, Jr., the nephew of the presiding Judge, was the Prosecuting Attorney; Jetty Steel, the brother of the presiding Judge, was a Deputy Prosecuting Attorney; and Jim Bob Steel, the son of the presiding Judge, participated as a Deputy Prosecuting Attorney in the trial.

Petitioner's Brief, Tr. 43.

Petitioner contends that the above facts demonstrate a violation of the Constitution of the State of Arkansas, the Arkansas statutes, the Code of Judicial Conduct adopted by the Arkansas Supreme Court and the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

[Slip opinion page 1]

This ground was raised on appeal and the Arkansas Supreme Court made the following findings:

> Appellant Jimmy Lee Dyas Personally Insists That The Court Erred in Trying His Case Because Of The Relationship Between The Trial Judge And The Prosecuting Attorney.
>
> Not only did appellant fail to object to Judge Steele's hearing of the case of request that he disqualify himself, but his brief reveals that his attorneys declined to accept Judge Steel's offer to disqualify himself prior to the trial. Appellant argues only that his attorneys should have consulted him before assenting to Judge Steel's continued handling of the case. The actual record is deficient on this point and appellant's complaint is too late and cannot be raised for the first time on appeal. We note that the identical surnames of the judge and the prosecuting attorney were obviously known.

Dyas v. State, 260 Ark. 303, 323 (1976).

It is well settled that [the] failure of a state court to comply with the provisions of state law in its criminal trials is purely a matter of local concern and is not reviewable by federal courts under the due process clause of the federal Constitution. Klimas v.

Mabry, 599 F.2d 842, 848 (8th Cir. 1979), rehearing denied, 603 F.2d 158, reversed on other grounds 448 U.S. 444 (1980).

> A federal issue is not presented unless the trial irregularities or evidentiary errors infringe upon a specific constitutional guarantee or amount to a denial of due process because of the prejudicial nature of the error. (Citations omitted.)
>
> In order to establish a denial of due process the petitioner must prove that the asserted error was so "gross," "conspicuously prejudicial," or otherwise of such magnitude that it fatally infected the trial and failed to afford petitioner the fundamental fairness which is the essence of due process. (Citations omitted.)

Morrow v. Wyrick, 646 F.2d 1229 (8th Cir. 1981).

Petitioner bases his argument on the contention that the judge's failure to recuse violated state law and judicial canons of ethics. In light of the above citations, it is clear that these contentions are not reviewable in this Court. [Slip opinion page 2]

As for the due process argument under the Constitution of the United States, petitioner has not alleged in his petition or his response to the motion to dismiss any specific prejudice or any evidence of unfairness in the trial. Nor does the Court find that prejudice may automatically be presumed in this situation. In addition, it would be difficult to find for the petitioner in any event inasmuch as the judge offered to recuse and petitioner's counsel declined to accept the offer.

IT IS THEREFORE ORDERED that this petition be and it is hereby dismissed.

Entered this 21st day of July 1982.

Elsijane T. Roy
United States District Judge
[Slip opinion page 3]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2016-EA September Term 1982

Jimmie Lee Dyas Appellant

vs.

Art Lockhart, Commissioner
of Arkansas
Department of Correction Appellee

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF ARKANSAS

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judges Ross, Arnold and Fagg would grant the petition for rehearing en banc.

June 14, 1983

No. 83-347

IN THE

Supreme Court of the United States

October Term, 1982

A.L. LOCKHART, Director, Arkansas Department of Correction,

Petitioner,

v.

JIMMY LEE DYAS,

Respondent.

ON PETITION FOR A
WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Attorney for Respondent

QUESTIONS PRESENTED FOR REVIEW

For the petitioner:

Whether the court of appeals erred in remanding the habeas petition for a hearing because respnodent allegedly did not allege actual bias in his habeas petition.

For the respondent in defense of the judgment:

Whether judicial bias can be presumed sufficient to support a denial of due process from the fact the trial judge at respondent's state murder trial was the father, brother, and uncle of the prosecutors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL AMENDMENTS:

RULES:

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. Introductory Statement

The petitioner's argument here is based on a disagreement over whether respondent made a

claim of actual bias in respondent's habeas corpus petition in the U.S. District Court for the Eastern District of Arkansas.

In his petition, respondent alleged that the trial judge was biased and this denied him due process of law. In his briefs in the federal courts, this issue was argued as one of presumed bias because of family relation and, alternatively, as one of actual bias. The court of appeals rejected the first argument but held that respondent was at least entitled to a hearing on the claim of actual bias. Dyas v. Lockhart, 705 F.2d 993 (8th Cir.1983).

In this Court, petitioner claims that the respondent did not allege actual bias. Respondent submits that this is not a correct assumption of what respondent argued in the courts below.

In addition, respondent submits that if this court decides to grant the petition for a writ of certiorari, the Court should also review whether the court of appeals erred in holding that the trial judge's close family relationship with the three members of the prosecution team in violation of Canon 3C(1)(d)(ii) of the Code of Judicial Conduct, adopted in Arkansas at the time of respondent's trial, does not constitute a denial

of due process of law.

2. Procedural History and Issues Raised

This is a habeas corpus case challenging the respondent's 1975 Little River County, Arkansas capital felony murder conviction and sentence of life imprisonment without parole in the 1975 murder of Curtis Eugene Zachry. Three people were convicted in the killing including respondent and Zachry's wife.

Petitioner handled his state appeal pro se and in forma pauperis, and he filed a 200+ page abstract and brief in the Arkansas Supreme Court. Respondent raised many potential grounds for reversal including the one at issue here. He contended the trial judge was biased against him because the trial judge, Bobby Steel (now deceased), was closely related to every member of the prosecution team: Prosecuting Attorney George B. Steel, Jr., was Judge Steel's nephew; Deputy Prosecuting Attorney Jetty Steel was Judge Steel's brother; Deputy Prosecuting Attorney Jim Bob Steel was Judge Steel's son. In addition, the official court reporter was Daisy Steel, the judge's wife, and the son of respondent's lead defense counsel,

Boyd Tackett, was engaged to marry one of the prosecutors right after the trial. The record is not yet complete on this latter question. It developed that Judge Steel offered to recuse in a letter to Mr. Tackett, and Mr. Tackett waived recusal for respondent without informing him of the offer as required by Canon 3D of the Code of Judicial Conduct.

The Arkansas Supreme Court affirmed respondent's conviction in a lengthy opinion, Dyas v. State, 260 Ark. 303, 539 S.W.2d 251 (1976), holding on the bias issue that respondent made no objection at trial, so it was raised for the first time on appeal, and, alternatively, that the record was incomplete on that issue; id. at 323, 539 S.W.2d at 263:

> Not only did appellant fail to object to Judge Steel's hearing of the case or request that he disqualify himself, but his brief reveals that his attorneys declined to accept Judge Steel's offer to disqualify himself prior to the trial. Appellant argues only that his attorneys should have consulted him before assenting to Judge Steel's continued handling of the case. The actual record is deficient on this point and appellant's complaint is too late and cannot be raised for the first time on appeal. We note that the identical surnames of the judge and the prosecuting attorney were obviously known.

Respondent raised this issue again in his petition to the Arkansas Supreme Court for permission to seek post-conviction relief in the Little River Circuit Court. That court granted permission to seek post-conviction relief, but not on this issue. The Circuit Court denied relief, and the Arkansas Supreme Court affirmed in an unpublished opinion.

Respondent then filed his federal habeas corpus petition pro se and in forma pauperis alleging numerous grounds for relief including this one. His family retained counsel, and the petition was redrawn with the original petitions attached and incorporated. The question of judicial bias was raised in ¶ 12 in counsel's typewritten petition and, specifically, grounds 38, 41, 42, and 45 and passim in the attached pro se petition.

The U.S. District Court denied relief without a hearing in an unpublished opinion (at 3):

> As for the due process argument under the Constitution of the United States, petitioner has not alleged in his petition or his response to the motion to dismiss any specific prejudice or any evidence of unfairness in the trial. Nor does the Court find that prejudice may automatically be presumed in this situation. In addition, it would be

difficult to find for the petitioner in any event inasmuch as the judge offered to recuse and petitioner's counsel declined to accept the offer.

On appeal to the Eighth Circuit Court of Appeals, respondent argued the judicial bias question as one of presumed bias and alternatively as actual bias. The court of appeals reversed. Dyas v. Lockhart, 705 F.2d 993 (8th Cir. 1983).

The court of appeals first held that there was no constitutional due process violation under respondent's argument of presumed judicial bias from the judge's and prosecutor's close family ties. The court of appeals distinguished this factual situation from those where the trial judge had a pecuniary interest in the outcome or had been the target of personal abuse by the litigants. Id. at 996-997. The court of appeals held, however, that respondent should have been permitted to have a hearing on the claim of actual bias, and it reversed and remanded for that purpose. Id. at 997.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The record does not support the petitioner's Question Presented For Review.

The petitioner's Question Presented for Review is premised on the petitioner's contention that the respondent did not allege actual judicial bias in his petition. To the contrary, respondent did allege actual bias in his original handwritten pro se petition for a writ of habeas corpus. When counsel got in the case, effective advocacy dictated that the claim be pursued as a claim of (1) presumed judicial bias as a denial of Fourteenth Amendment due process from the close family relationship of the trial judge and the prosecutors, and (2), alternatively, a claim of actual judicial bias of the trial judge on which respondent has continually been denied a hearing in any court on post-conviction or habeas review.

The district court denied relief without a hearing finding no presumed bias from the relationship and no actual bias because the claim was

not raised at trial and because respondent's counsel waived the judge's recusal for him (whether or not respondent was informed of the recusal offer was treated by the district court as legally irrelevant). Respondent has alleged throughout these proceedings that he was not informed of the trial judge's recusal offer to his counsel and that the trial judge was actually biased.

The court of appeals held with the petitioner on the presumed bias argument but reversed and directed a hearing on the waiver of the judge's recusal contention underlying the actual bias argument. The court of appeals did hold that the trial judge's family relationship with the prosecutors could be considered along with his overall conduct of the trial as bearing on whether actual bias existed. Respondent has not succeeded in having the writ granted -- he has only been able to have a hearing on his claim of actual bias.

In this regard, the court of appeals was simply following the requirements of Townsend v. Sain, 372 U.S. 293, 312-313 (1963):

> Where the facts are in dispute, the federal court must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state court trier of fact has after a full hearing reliably found the relevant facts. (footnote omitted)

Here, the facts are in serious dispute on the actual bias claim and the underlying waiver of the recusal offer, and respondent has yet to have a hearing in any court on the actual bias claim even though he has been raising it for more than seven years.

The lack of any hearing on the habeas claim thus distinguishes this case from Smith v. Phillips, 455 U.S. 209 (1982), where the Court rejected a presumption of juror bias where the state hearing judge found beyond a reasonable doubt that the misconduct of the prosecutors and juror did not affect the verdict. Also, the state trial judge's failure to follow Canon 3D of the Code of Judicial Conduct and Arkansas law and get a personal waiver from respondent when the judge offered to recuse to defense counsel, as alleged in the habeas petition, and the failure of

any tribunal to grant a hearing on this issue distinguishes this case from Cuyler v. Sullivan, 446 U.S. 335 (1980).

Thus, the court of appeals has not decided this case contrary to the decisions of this Court nor has it "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision," S.Ct.Rule 17.1(a). Furthermore, this issue is not an important question of federal habeas corpus law in light of the factual contentions. S.Ct.Rule 17.1(c)

2. If the Court does grant review, it should decide the whole case including the issue decided against respondent below; i.e., whether judicial bias can be presumed sufficient to support a denial of due process from the fact the trial judge at respondent's state murder trial was the father, brother, and uncle of the prosecutors.

Respondent has not filed a cross-petition for certiorari. Nevertheless, if the Court grants the petition for a writ of certiorari, it should, in

its discretion, grant review of the question respondent lost below involving the state trial judge's presumed judicial bias because he was the father, brother, and uncle of respondent's prosecutors at the murder trial. See United States v. New York Telephone Co., 434 U.S. 159, 166 n. 8 (1977) (Court has discretion to consider a ground not raised in the petition but raised by respondent "because the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted.").

A.

In re Murchison, 349 U.S. 133, 136 (1955), the Court held:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness . . . Circumstances and relationships must be considered. This Court has said, however, that "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law." Tumey v. Ohio,

> 273 U.S. 510, 532. [To] perform its high function in the best way "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14. (emphasis added)

See also Johnson v. Mississippi, 403 U.S. 212, 216 (1971) ("Trial before 'an unbiased judge' is essential to due process."); Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971); Bloom v. Illinois, 391 U.S. 194, 205 (1968).

The Third Circuit stated in Rapp v. Van Dusen, 350 F.2d 806, 812 (3d Cir. 1965): "For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality." Rapp was followed in United States v. Brown, 539 F.2d 467, 469 (5th Cir. 1976).

Many cases have held that the right to an impartial trial judge is a due process right. See, e.g., United States v. Scuito, 531 F.2d 842, 845 (7th Cir. 1976) ("The right to a tribunal free from bias or prejudice is based, not on [statute], but on the Due Process Clause."); United States v. Kames, 531 F.2d 214 (4th Cir. 1976); United States v. Meyer, 149 U.S. App. D.C. 212, 462 F.2d 827, 836 (1972); Cross v. Georgia, 581 F.2d 102, 104 (5th Cir. 1978);

United States v. Gower, 447 F.2d 187, 191 (5th Cir. 1971), cert. den. 404 U.S. 850; United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1963), cert. den. 372 U.S. 978; United States v. Conforte, 457 F.Supp. 641, 659 n.1 (D.Nev. 1978) (due process right separate from recusal); United States v. Boffa, 513 F.Supp. 505, 508 (D.Del. 1981) (same); Sheppard v. Maxwell, 231 F.Supp. 37, 65 (S.D.Ohio 1964), rev'd on other grounds 346 F.2d 707 (6th Cir.), rev'd 384 U.S. 333 (1966).

B.

The Code of Judicial Conduct was the law of Arkansas at the time of respondent's trial. Canon 3C(1)(d)(ii) mandated the trial judge's disqualification where he was related to attorneys for the parties unless there was a personal waiver by the litigant under Canon 3D. Adams v. State, 269 Ark. 548, 601 S.W.2d 881 (1980); Edmondson v. Farris, 263 Ark. 505, 565 S.W.2d 617 (1978). See Byler v. State, 210 Ark. 790, 197 S.W.2d 748 (1946).

The Arkansas court refused to reverse respondent's conviction because of this problem,

but it did reverse the conviction in 1980 in Adams in the absence of a personal waiver on substantially similar facts. Adams also involved Judge Steel and family, except that the judge had since died.

C.

The issue respondent has presented is a significant issue which has not yet been specifically decided by this Court.

In Smith v. Phillips, supra, the Court held that there was no presumption of juror bias sufficient to make a denial of due process for habeas corpus relief. There, however, the fact finder found beyond a reasonable doubt that the verdict was not affected by the alleged juror misconduct. In Cuyler v. Sullivan, supra, at 349-350, the Court held that it would not presume a Sixth Amendment denial of effective assistance of counsel where multiple trial counsel allegedly represented conflicting interests but where the habeas petitioner had not "show[n] that his counsel actively represented conflicting interests."

The claim here, however, is substantially

more fundamental and a presumption of judicial bias for the appearance of impropriety should be held to state a due process claim. The courts have long recognized that the "appearance of justice" is just as important as the "reality of justice." Respondent submits that In re Murchison, quoted supra, as applied to these facts requires a finding that the inherent judicial bias recognized in Canon 3C(1)(d)(ii) rises to the level of a due process violation where there is no waiver under Canon 3D and without the necessity of a showing of actual bias. This question should be reviewed by this Court. S.Ct. Rule 17.1(c).

CONCLUSION

For the reasons stated in part 1, the petition for a writ of certiorari should be denied.

If, however, the Court grants certiorari on that issue, it should also grant review of the issue discussed in part 2.

Respectfully submitted,

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